

**Consideration of objections and other pleadings with respect to  
“Findings of Fact and Conclusions of Law with Nonfinal Order” by  
the Administrative Law Judge in *Lucy V. Cress, et al., v. Byrer, et al.*,  
Administrative Cause No. 12-192W:**

- Findings of Fact and Conclusions of Law with Nonfinal Order, dated July 2, 2014
- Claimant, Lucy V. Cress’ Preliminary Motion for More Definite Statement to the Findings of Fact and Conclusions of Law with Nonfinal Order, filed July 21, 2014
- Claimant, Lucy V. Cress’ Objections to the Findings of Fact and Conclusions of Law with Non-Final Order and Request for Oral Argument, filed July 21, 2014
- John and Sheri Byrer’s Response to Motion for More Definite Statement, filed July 24, 2014
- Entry with Respect to Cress Motion for More Definite Statement, dated July 28, 2014
- John and Sheri Byrer’s Response to Objections

**BEFORE THE  
NATURAL RESOURCES COMMISSION  
OF THE  
STATE OF INDIANA**

**IN THE MATTER OF:**

<b>LUCY V. CRESS, ROBERT A.</b>	)	
<b>SCHULTZ and BARBARA J. SCHULTZ,</b>	)	
<b>Claimants,</b>	)	<b>Administrative Cause</b>
	)	<b>Number: 12-192W</b>
<b>vs.</b>	)	
	)	
<b>JOHN BYRER and SHERI BYRER,</b>	)	
<b>Respondents.</b>	)	
	)	<b>(Riparian Rights Dispute)</b>
<b>DEPARTMENT OF NATURAL RESOURCES,</b>	)	
<b>Agency Respondent.</b>	)	

**FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH NONFINAL ORDER**

**I. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**Statement of the Proceeding and Jurisdiction**

1. On October 30, 2012, Lucy V. Cress ("Cress") filed a "Temporary Structure Dispute/Complaint" (the "Cress Complaint") with the Natural Resources Commission (the "Commission") in which she asserted a grievance against John Byrer and Sheri Byrer (the "Byrers").
2. Also on October 30, 2012, Robert A. Schultz and Barbara J. Schultz (the "Schultzes") filed correspondence (the "Schultzes Complaint") in which the Schultzes asserted a grievance against the Byrers.
3. Cress owns real estate at 95 Ln. 130A Lake George, Fremont, Indiana (the "Cress Property"); the Schultzes own real estate at 140 Ln. 130A Lake George, Fremont, Indiana (the "Schultzes Property"); and, the Byrers own real estate at 140 Ln. 130A Lake George, Fremont, Indiana (the "Byrers Property"). The Cress Property includes on its west side approximately 66 feet of frontage along Lake George within Lot 23 in the Plat of Wilder's Addition to Spring Bank in

Jamestown Township of Steuben County (“Lot 23”). The Schultzes Property is to the north in Lot 24 and shares a common boundary with the Cress Property (“Lot 24”). The Byers Property includes Lot 38, and it is east of the Cress Property and across Lane 130 A Lake George (“Lot 38”). The Byers Property was granted easement rights to Lake George by a previous owner of the Cress Property.

4. Lake George in Steuben County is a “public freshwater lake” as the phrase is defined at Ind. Code § 14-26-2-3 and 312 Ind. Admin. Code § 11-2-17 and is subject to IC § 14-26 (the “Lakes Preservation Act”). *Indiana Dept. of Nat. Res. v. Lake George*, 889 N.E.2d 361 (Ind. App. 2008) and “Listing of Public Freshwater Lakes”, Information Bulletin #61 (Second Amendment), Indiana REGISTER, 20110601-IR-312110313NRA (June 1, 2011), p. 8. The Commission adopted rules at 312 IAC § 11 to assist with administration of the Lakes Preservation Act.

5. The Cress Complaint and the Schultzes Complaint describe disputes regarding the exercise of riparian rights by the Byers for a portion of Lake George in Steuben County, Indiana.

6. The same administrative law judge was appointed to consider the Cress Complaint and to consider the Schultzes Complaint. During the initial prehearing conferences held concurrently on January 25, 2013 to consider the Cress Complaint and the Schultzes Complaint, Cress, the Schultzes, and the Byers agreed to consolidate the two complaints into this single proceeding. Cress and the Schultzes are collectively the “Claimants”. The Byers are the “Respondents”.

7. During the initial prehearing conference, Cress moved to add the Department of Natural Resources (the “DNR”) as a party. The DNR responded that particularly if mediation were to occur, the inclusion of DNR as a party might be well-considered. The Byers did not object to inclusion of the DNR, and the DNR was added as a party. The DNR is the “Agency Respondent”. The Claimants, the Respondents, and the Agency Respondent are collectively the “Parties”. Each of the Parties was present during the initial prehearing conference either in person or through an attorney.

8. The Lakes Preservation Act places full power over public freshwater lakes in Indiana. The State holds public freshwater lakes in trust for all Indiana citizens to preserve the lakes’ natural scenic beauty and for recreational purposes. The DNR is the agency responsible for

administering the trust. *Indiana Dept. of Nat. Res. v. Lake George*, 889 N.E.2d 361 (Ind. App. 2008) and *Lake of the Woods v. Ralston*, 748 N.E.2d 396, 401 (Ind. App. 2001).

9. The Commission is the “ultimate authority” for agency determinations under the Lakes Preservation Act, including those derived from competing interests among persons claiming riparian rights or interests in riparian rights that may be sufficient for the placement of piers and similar structures in public freshwater lakes. IC § 14-10-2-4 and IC § 14-26-2-23. *Kranz v. Meyers Subdivision Property Owners*, 969 N.E.2d 1068, 1075 (Ind. App. 2012) and *Lukis v. Ray*, 888 N.E.2d 325 (Ind. App. 2008).

10. The Lakes Preservation Act is derived from legislation originating in 1947. Statutory amendments made in 2000 included the addition of IC § 14-26-2-23. The amendments clarified the Commission is responsible for adopting rules to help implement a licensure program that includes temporary piers. The Commission is also charged with resolving disputes between “the interests of landowners having property rights abutting public freshwater lakes or rights of access to public freshwater lakes.” The Commission is to address “competing riparian interests”. IC § 14-26-2-23(e) and IC § 14-26-2-23(f).

11. The Commission has jurisdiction over the subject matter and over the persons of the Parties.

### **Delineation of the Riparian Zones of the Cress Property and of the Schultzes Property**

12. Where the shoreline approximates a straight line, and where the onshore property boundaries are approximately perpendicular to this line, the boundaries of riparian zones are determined by extending the onshore boundaries into the public waters. *Bath v. Courts*, 459 N.E.2d 72, 73 (Ind. App. 1984) and the “second principle” in Information Bulletin #56 (Second Amendment), Indiana REGISTER, 20100331-IR-31200175NRA (March 31, 2010), p. 3.

13. The Parties stipulated the second principle delineates properly the common boundary between the riparian zones of the Cress Property and of the Schultzes Property.<sup>1</sup> “Entries Regarding Identification of Riparian Zones of Cress and the Schultzes and Availability of Sandra

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<sup>1</sup> Entries prior to the hearing of the facts referred erroneously to the Cress Property as Lot 25. The error was corrected during the hearing. The Cress Property is Lot 23.

Jensen to Serve as Mediator” (April 4, 2013). The shoreline along the Cress Property and the Schultzes Property approximates a straight line, and their common onshore property boundary is approximately perpendicular to the shoreline. Use of the second principle is an appropriate delineation, and the Parties’ stipulation is approved. The boundary of the riparian zone between the Cress Property and the Schultzes Property is determined by extending their common onshore boundary in a straight line into Lake George.

### **Adjudication of Riparian Interests**

14. The Claimants are riparian owners. The Byers are not riparian owners but have an easement across the Cress Property. The Byers hold the dominant estate and Cress the servient estate. A determination that persons are not riparian owners “does not settle the question of whether they are entitled to install and use a dock in the property enjoyment of their easement for right-of-way purposes.” *Klotz v. Horn*, 558 N.E.2d 1096, 1097 (Ind. 1990), citing *Farnes v. Lane*, 281 Minn. 222, 161 N.W.2d 297, 301 (Minn. 1968). “The issue is not whether the easement holder attains riparian ownership status, but rather, whether he is entitled to *use* the riparian rights of the servient tenant who has given him access to the body of water bordering the servient estate.” Emphasis supplied by the *Klotz* court at 1097.

15. The intentions of the riparian owner who originally granted an easement are to be implemented in construing the easement. In a plat or other recorded conveyance, clear language controls. “Dominant owners of lakeside easements may gain the rights to erect and maintain piers, moor boats and the like by the express language of the creating instrument.” *Klotz* at 1097 and 1098. Related documents are construed in *pari materia*. *Charles & Miller v. Dyer*, 13 Caddnar 246, 250 (2014).<sup>2</sup>

16. Clear and unambiguous language controls. “[G]enerally, access to a body of water is sought for particular purposes beyond merely reaching the water, and where such purposes are not plainly indicated, a court may resort to extrinsic evidence to assist the court in ascertaining what they may have been.” *Klotz* citing *Badger v. Hill*, 404 A.2d 222, 226, (Me. 1979). In *Klotz*, the Indiana Supreme Court determined the phrase “access to Eagle Lake” for a six-foot wide

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<sup>2</sup> As provided in IC § 4-21.5-3-32, an agency is required to index final orders and may rely upon indexed orders as precedent. Caddnar is the Commission’s index of final orders.

easement was ambiguous and properly required the consideration of “extrinsic or parol evidence to ascertain the intent of the parties who created the instrument.” A factor determined appropriate to identifying intent was whether, in the absence of a pier, shoreline conditions would make difficult the dominant estate’s access to and enjoyment of the lake.

17. The record of title in this proceeding is extensive. Aspects of grantor intent are unambiguous and others are ambiguous.

18. In 1929, Alline Buck Bender (“Bender”) received warranty deeds to both Lot 23 and Lot 38.

19. In 1942, Bender conveyed a portion of Lot 23 to Phil S. Morse. She included a conveyance of the following easement or passway:

Also, conveying an easement or passway 6 feet in width off the north side of the east part of said Lot #23 extending from the land above described to the street or roadway along the east side of said Lot #23....

Excepting an easement or passway 6 feet in width off the north side of the above described premises extending from the east 65 feet of said lot to the water front of Lake George for the use of the owners or tenants of the cottages located on the east part of said Lot #23 and on Lot #38 of said Plat.

Also reserving the docking privileges for two boats at the northwest part of said Lot #23 for the owners or tenants of Lot #38 of said Plat.

Respondent Exhibit B and Exhibit C.

20. In 1942, Bender conveyed to H. Poast the east end of Lot 23, together with a conveyance, as follows:

The east 65 feet, east and west, off the entire east end of Lot numbered 23..., excepting an easement or passway six feet in width off the north side of the above described premises for the use of owners or tenants of cottage on the west portion of said Lot #23 and the owners or tenants of cottage on Lot #38 of said Plat. Also conveying an easement or passway 6 feet in width off the north side of the west part of said Lot #23 extending from the land above described to the water front of Lake George; also docking privileges for two boats at the northwest part of said Lot #23.

21. Also in 1942, Bender conveyed Lot 38 to Arthur and Bertha Sanders with the following easement or passway:

Lot numbered thirty-eight (38)...according to the recorded plat thereof.

Also, an easement or passway six feet in width extending from the street or road on the west side of said Lot #39 to the water front of Lake George, said easement or passway being off the north side of Lot #23....

Also conveying a dock privilege for two boats off the northwest part of Lot #23 in said Addition for the owner or tenant of the cottage located on said Lot #38.

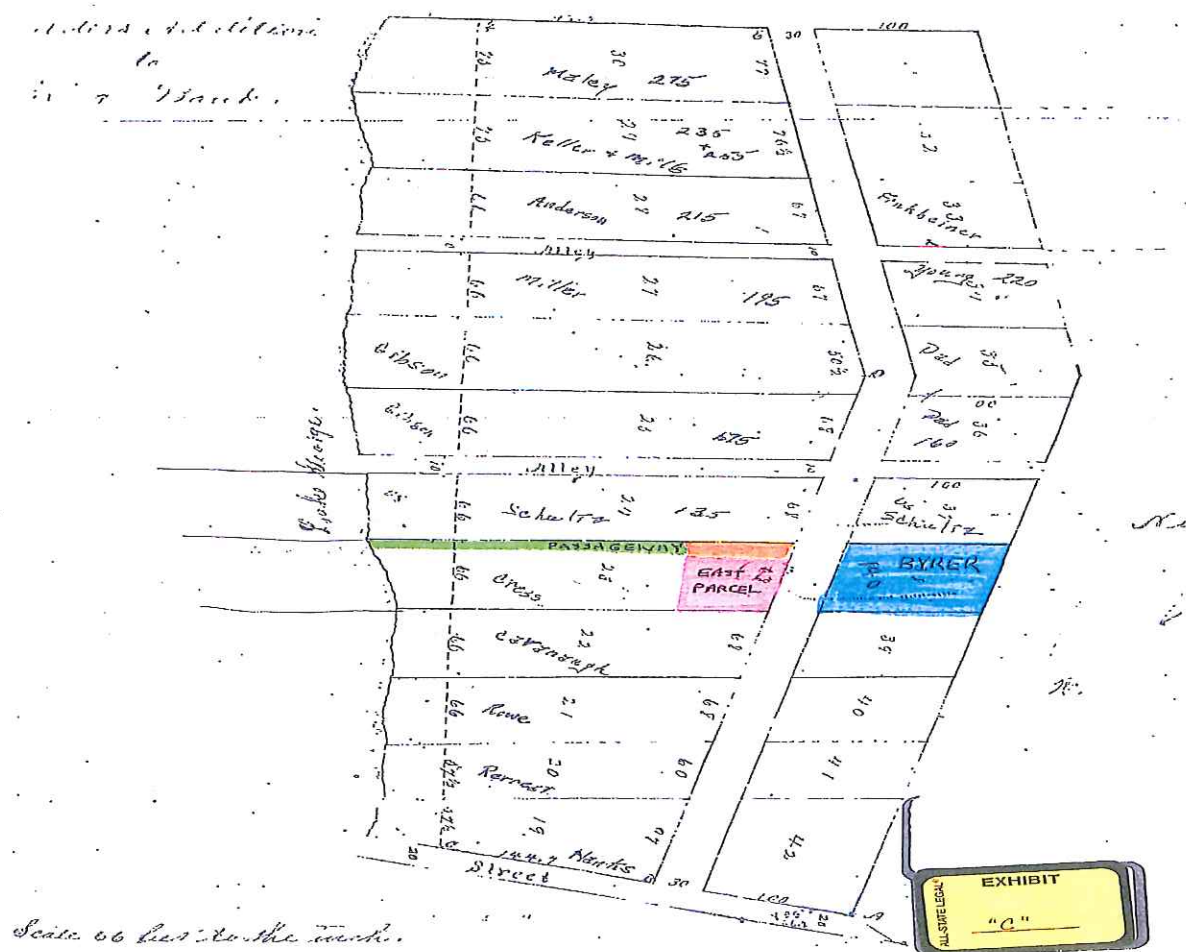
Using the same description, Lot 38 passed through a chain of title and then to Daniel and Nancy Vail in 1985. Respondent Exhibit Q.

22. In 1992, Nancy Vail, an unmarried widow, conveyed Lot 38 to John H. Byrer and Sarah L. Hull as follows:

Lot numbered Thirty-eight (38) in the Plat....

Also an easement 6.0 feet in width off from the North side of Lot numbered Twenty-three (23)...., together with dock privileges [as described in Finding 21].

23. A conceptual rendering of the site in question, without identification of riparian zones or non-riparian interests within Lake George, is colorized and identified as Exhibit "C" in the "Respondents' Post-Trial Brief":



24. The grantor intent was unambiguous in that a six-foot wide easement was established along the northern border of Lot 23, for the benefit of owners of the eastern portion of Lot 23 and the owners of Lot 38, to access Lake George. The grantor intent was also unambiguous in that the owners of the eastern portion of Lot 23 were granted docking privileges for two boats, and the owners of Lot 38 were granted docking privileges for two boats, off the northwest part of Lot 23. In its “Answer, Affirmative Defenses & Counterclaim”, the Byrers assert “a deeded right for a pier and two boats....”

25. The grantor intent was ambiguous in that the geographic boundaries of the docking privileges within Lake George were not identified. Many of the decisions cited by Cress or the DNR resolve ambiguity for situations when an easement of a stated width (for examples, six feet or 15 feet) are not accompanied by a separate grant identifying dock privileges within another more general but potentially larger area. Here that area is defined by the grantor as “the northwest part of Lot #23”.

26. Regardless of intent, the grantor was limited by two principles of law. These principles also govern what a grantee may receive. Regardless of grantor intent, these principles restrict what the Byrers may place within Lake George.

27. The first restriction is that the Byrers hold the dominant estate and Cress holds the servient estate for the riparian zone derived from Lot 23. An easement may encumber a riparian zone but does not form a separate riparian zone. *Kranz v. Myers Subdivision Owners*, 973 N.E.2d 615, 618 (Ind. App. 2012). The Schultzes have riparian rights derived from Lot 24. The Byers and Cress share one riparian zone and share riparian rights within a portion of the zone. The Schultzes have a separate riparian zone. Finding 12 and Finding 13. The grantor had no authority to give and the Byers could not receive riparian rights derived from Lot 24.

28. The second restriction is that a trust exists on a public freshwater lake for which the State of Indiana is the trustee. The DNR is the agency primarily responsible for administering the trust. The Lakes Preservation Act places full power of public freshwater lakes in the State to hold in trust for all Indiana citizens to preserve natural scenic beauty and for recreational purposes,



including boater and swimmer safety. Finding 8. Usage by a riparian owner or an easement received from a riparian owner cannot violate the public trust.

29. Within these two restrictions, ambiguity in an easement may be derived from extrinsic and parol evidence. *Klotz* cited previously and Finding 16.

30. Here the Parties at hearing provided a thorough and extensive history of the usage of the waters of Lake George, generally, as well as of the particular site in question. With the exception of use of “double boats” which may have been unique to Lake George in the 1940s, the history is typical of use of public freshwater lakes in Northern Indiana during the 20<sup>th</sup> Century and early 21<sup>st</sup> Century. Usage has become more crowded over the last 70 years with larger and greater numbers of moored boats. The specifics of structural placement and mooring boats have been dynamic. As boat and land ownership changed, so did pier configurations.

31. Boat owners at the site have sometimes expanded their own use with little consideration for their neighbors, the riparian rights of others, or the interests of the general public. But “[f]irst in time first in right is not a viable factual or legal principle for determining the rights of riparian owners or those of the public on the waters of public freshwater lakes.” *Island Prop. Owners Ass’n v. Clemens and DNR*, 12 Caddnar 56, 68 (2009). Placing piers and mooring boats is not a superior purpose to leaving waters unimpeded. That a riparian owner elects to leave a riparian zone open is not an invitation to another person to moor a boat. Mooring a boat in the riparian zone of another does not typically vest a right the boat owner. “Recreational use (especially of water which leaves no telltale path or road)...seems...likely to be permissive” and not actionable to establish a property right in the user. *Carnahan v. Moriah Property Owners Ass’n*, 716 N.E2d 487 (Ind. 1999).

32. A factual constant is difficult to identify in this proceeding. But the Byrers and their predecessors in interest have commonly used more than the six feet of lake waters that are immediately adjacent to the six-foot wide easement. Even in the 1940s when testimony supports a finding that two-foot wide piers were not uncommon, the modest “double boat” was more than four feet wide. A double boat and a pier would have encumbered more than six feet of shoreline. Today piers are typically three feet wide,

and some types of boats are commonly eight feet wide. The Byers and their predecessors have placed piers on both sides of a three-foot wide pier. The parol evidence is that use by the Byers and their predecessors in interest has commonly exceeded six feet in width.

33. If the grantor had intended the lake space for docking to be the same as the easement, the grantor could have specified a width of six feet or at least written nothing more than that docking was available. The use of additional language indicates the grantor had something more in mind. The presumption is that parties intend for every part of an easement to have some meaning, and a construction is favored that reconciles and harmonizes the entire document. *Parkinson v. McCue*, 831 N.E.2d 118, 128 (Ind. App. 2005). The grantor intent in using the phrase “off the northwest part of Lot #23” is ambiguous, but parol evidence supports a finding the use of a space wider than six feet was anticipated. “Any doubt or uncertainty as to construction of the language of the easement will ordinarily be construed in favor of the grantee.” *Rehl v. Billetz*, 963 N.E.2d 1, 7 (Ind. App. 2012) citing *McCauley v. Harris*, 928 N.E.2d 309, 314-315 (Ind. App. 2010).

34. John Byrer testified at hearing that he could exercise the boating rights derived from the dominant estate for Lot 23 with a shoreline width of 13 or 14 feet. A maximum width of fourteen feet is consistent with the terms of the easement granting the ability to dock boats off the northwest part of Lot 23.

35. The Byers must not encroach on the riparian zone of the Schultzes. No other Party objected to their placement of a pier along the common riparian line between the Byrers and the Schultzes. The Byers should be authorized to place a pier extending a reasonable distance into Lake George that is no less than one foot south of the common riparian line. No structure should be placed and no boat should be moored within one foot south or within five feet north of the common riparian line.

36. The Byers should be authorized to moor two boats on the south side (or one on the south side and one on the lakeward side) of a single straight pier that is not more than three feet wide and that also conforms to the requirements of the previous Finding. The Byers should not place or

authorize a pier or another structure and should not moor or authorize the mooring of a boat more than 15 feet south of the common riparian line between Lot 23 and Lot 24.

37. Cress should not place or authorize a pier or another structure or moor or authorize the mooring of a boat within 25 feet south of the common riparian line between Lot 23 and Lot 24. The limitation is an appropriate consequence of the phrase “at the northwest part of Lot #23”.

### **Disposition of Affirmative Defenses**

38. The Byrers asserted several affirmative defenses or counterclaims. In their “Answer, Affirmative Defenses & Counterclaim”, they raise several equitable principles that they assert bar the claims by Cress. These included waiver, estoppel, laches, and acquiescence. In her “Answer and Affirmative Defenses”, Cress mirrors the same equitable claims to bar relief sought by the Byrers, and she adds unclean hands.

39. A person seeking the benefit of an affirmative defense has the burden of proof. Many affirmative defenses invoke equitable principles. Trial Rule 8 applied through 312 IAC § 3-1-4. *Belcher & Belcher v. Yager-Rosales*, 11 Caddnar 79 (2007). Equitable principles are diverse and typically require the satisfaction of multiple elements. *Town of New Chicago v. City of Lake Station*, 939 N.E.2d 638 (Ind. App. 2010). Other identified affirmative defenses (such as the Byrers claims they are merely seeking to defend deeded rights or the Cress claim the Byrers are limited to the use of six feet of frontage) are restatements of claims otherwise addressed here. Except as considered previously in this order, the evidence does not support a disposition upon the affirmative defenses raised by either the Byrers or Cress.

40. No relief is granted to either Cress or to the Byrers based on claims made which are particular to their affirmative defenses.

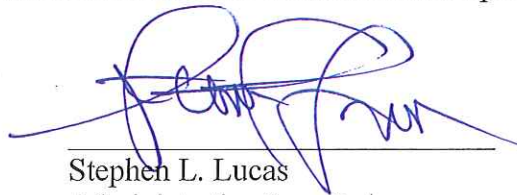
## **II. NONFINAL ORDER**

The following orders are effective October 1, 2014. The orders apply to Lucy V. Cress, Robert A. Schultz, Barbara J. Schultz, John Byrer, Sheri Byrer, and their heirs and assigns, and upon recordation with the Recorder of Steuben County, would apply to subsequent owners of Lot 23,

Lot 24, and Lot 38 of Wilder's Addition to Spring Bank. The orders also apply to the Department of Natural Resources with respect to implementation of IC § 14-26-2, 312 IAC § 11, and to statutes or rules that may be subsequently derived from them:

- (A) John Byrer and Sheri Byrer must not place a structure or moor a boat in Lake George adjacent to Lot 23 or Lot 24 unless consistent with the following: The Byers shall not encroach on the riparian zone of the Schultzes as identified in Finding 13. The Byers may place a pier a reasonable distance into Lake George that is no less than one foot south of the common riparian line between Lot 23 and Lot 24. The Byers must not place a structure north of the pier. The Byers may moor two boats on the south side (or one on the south side and one on the lakeward side) of a single straight pier that is not more than three feet wide. The Byers must not place or authorize a pier or another structure and must not moor or authorize the mooring of a boat more than 15 feet south of the common riparian line between Lot 23 and Lot 23.
- (B) Robert A. Schultz and Barbara Schultz must not place a structure or moor a boat within five feet north of the common riparian line between Lot 23 and Lot 24.
- (C) Lucy V. Cress must not place or authorize a pier or another structure or moor or authorize the mooring of a boat within 25 feet south of the common riparian line between Lot 23 and Lot 24.

Dated: July 2, 2014



Stephen L. Lucas  
Administrative Law Judge  
Natural Resources Commission  
Indiana Government Center North  
100 North Senate Avenue, Room N501  
Indianapolis, IN 46204-2200

(317) 233-3322

A copy of the foregoing was sent to the following persons. A person that files a pleading or document with the Commission must also serve a copy on these persons or their attorneys:

Jonathan O. Cress  
Attorney at Law  
Cresslaw Group PC  
430 North Wayne Street, Suite 1A  
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Eric L. Wyndham  
Office of Legal Counsel  
Department of Natural Resources  
Indiana Government Center South  
403 West Washington Street, Room W295  
Indianapolis, IN 46204

cc: Lori Schnaith, DNR Division of Water



1. That at hearing on April 22, 2014, Cress argued and evidence was given that it was clear from the language of the easements that the Byrers may not maintain a boat lift.

2. That Cress asserted that the easement does not specifically address the right to a boat lift or grant the Byrers the privilege to maintain a boat lift, thus, the maintenance of a boat lift exceeds the scope of the easement and is not permitted.

3. That evidenced and testimony was presented to the Court that Byrers maintained a boatlift, which exceeded the scope of the easement.

4. That evidenced and testimony was presented to the Court that the easement *does not* state that lot owners may place a boat lift or station off the northwest part of Lot 23.

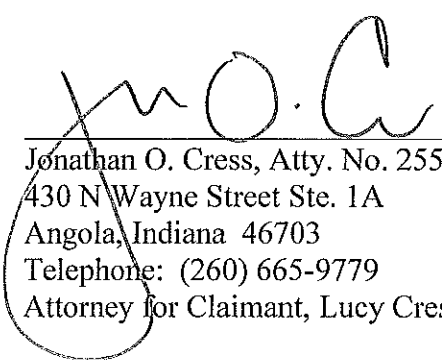
5. That Respondent, John Byer testified that the easement *does not* state that lot owners may place a boat lift or station off the northwest part of Lot 23.

6. That Cress contends that docking privileges do not include the authority to placement of a boatlift or other structures other than a boat and pier.

WHEREFORE Claimant, Lucy V. Cress ("Cress"), by counsel, CRESS LAW GROUP PC, by Jonathan O. Cress request a more definite statement, as it relates to the Byrers right to place a boat lift or other structures other than a boat and pier in the Cress riparian zone and for any and all relief is just and proper in the premises

Respectfully submitted:

CRESS LAW GROUP PC



Jonathan O. Cress, Atty. No. 25535-76  
430 N Wayne Street Ste. 1A  
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Telephone: (260) 665-9779  
Attorney for Claimant, Lucy Cress

**CERTIFICATE OF SERVICE**

The undersigned certifies that on the 21 day of July, 2014, a true and correct copy of the foregoing pleading was served upon the following via first class mail, postage prepaid.

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Jason Kutchmay  
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Indianapolis, Indiana 46204-2200

  
Jonathan O. Cress



BEFORE THE  
NATURAL RESOURCES COMMISSION  
OF THE  
STATE OF INDIANA

**FILED**

**JUL 21 2014**

**IN THE MATTER OF:**

NATURAL RESOURCES COMMISSION  
DIVISION OF HEARINGS

<b>LUCY V. CRESS, ROBERT A.</b>	)	<b>Administrative Cause</b>
<b>SCHULTZ, and BARBARA J.</b>	)	
<b>SCHULTZ</b>	)	
<b>Claimants,</b>	)	<b>Number: 12-192W</b>
	)	
<b>vs.</b>	)	<b>(Riparian Right Dispute)</b>
	)	
<b>JOHN BYRER and SHERI BYRER,</b>	)	
<b>Respondents.</b>	)	

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**CLAIMANT, LUCY V. CRESS' OBJECTIONS TO THE FINDINGS OF FACT AND  
CONCLUSIONS OF LAW WITH NON-FINAL ORDER  
AND REQUEST FOR ORAL ARGUMENT**

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COMES NOW Claimant, Lucy V. Cress ("Cress"), by counsel, CRESS LAW GROUP PC, by Jonathan O. Cress and files her objections to the Findings of Fact and Conclusions of Law With Non-Final Order dated July 2, 2014 ("Non-Final Order"); and states as follows:

**A. Cress objects to the findings of fact and conclusion of law contained in paragraph 19 of the Non-Final Order.**

1. The Court's findings in Paragraph 19 of the Non Final Order is contrary to the evidence and the terms of the easement agreement, as set forth more fully below.

2. Paragraph 19 of the Non Final Order provides, in part, that Alice Bender ("Bender") conveyed a portion of Lot 23 to Phil S. Morse and granted docking privileges for two boats at the northwest part of Lot #23 for the owners or tenants of Lot #38 of said Plat.

3. However, the easement language contained within the Warranty Deed to Phil and Mildred Morse provided actually, in part, that:

Excepting an easement or passway 6 feet in width off the north side of the above described premises extending from the east 65 feet of said lot to the water front of Lake George for the use of the owners or tenants of the cottages located on the east part of said Lot #23 and on Lot #38 of said Plat.

Also reserving the docking privileges *for two boats at the northwest part of said lot #23 for the owners or tenants of the east part of said Lot #23 and* for two boats for the owners or tenants of Lot #38 of said Plat. (*Emphasis added.*)

4. Bender acquired ownership to Lot 23 (“Cress Property”) and Lot 38 (Byrer Property”) in 1929. Bender later split Lot 23 into two separate properties, i.e. East Lot 23 and West Lot 23 and created the easements when auctioning all three properties in 1942.

5. The easement created an easement and docking privileges for more than just Lot 38. The easement language granted a passway of 6 feet in width off the northwest side of Lot 23 and docking privilege for two boats for the East Lot 23 and docking privilege for two boats for Lot 38.

6. The express language of the easement would entitle two property owners access to Lake George to dock a total of four boats off the northwest side of Lot 23.

7. Nonetheless, the Court’s finding indicates only Lot 38 was granted a passway of 6 feet in width off the north side of Lot 23 and docking privilege for two boats off the northwest side of Lot 23.

8. This finding is inconsistent with the easement as the express language of the easement would authorize East Lot 23 and Lot 38 access to Lake George to dock a total of four boats off the northwest side of Lot 23; therefore Cress objects to the Court’s characterization of the easement language.

**B. Cress objects to the findings of fact and conclusion of law contained in paragraph 32 of the Non-Final Order.**

9. The Court's findings in Paragraph 32 of the Non Final Order is contrary to the evidence, the terms of the easement agreement and Indiana law, as set forth more fully below.

10. Paragraph 32 of the Non Final Order provides, in part, that a factual constant is difficult to identify in this proceedings.

11. Cress would respectfully object to such finding, at least as it relates to Cress' claims. The relevant and material evidence given at hearing on April 22, 2014 relating to the Cress and Respondents, John Byrer and Sheri Byrer ("Byrers") claim were generally uncontradicted by either party.

12. Paragraph 32 of the Non Final Order further provides, in part, that the Byrers and their predecessors in interest have commonly used more than the six feet of lake waters that are immediately adjacent to the six-foot wide easement.

13. A plain reading of this finding can be misleading, as evidence was only given that two owners ever used the easement to place a pier and moor boat(s).

14. Respondent, John Byrer testified that he used more than the six feet of lake waters that was immediately adjacent to the six-foot wide easement.

15. It should be noted that John Byrer testified he used more than six feet of lake water by encroaching on the other claimants, Robert and Nancy Shultz (the "Schultzs") riparian zone.

16. That John Byrer further testified that from 1992 to 1993, the Byrers docked a 1977 Ski Nautique on the Schultz side of the pier in the Schultz riparian zone. John Byrer also testified that from 1993 to 1998, Byrers did not maintain or dock a boat at the Byrer's pier. He also testified that from 2002-2007, he moored a fishing boat on the Cress side of the pier and a 1986 Ski Nautique with lift on the Schultz side of the pier in the Schultz riparian zone.

17. The only other evidence presented supporting that a property owner of Lot 38 used more than six feet of lake water, was by way of offering into evidence the Affidavit of Nancy L. Vinson f/k/a Nancy L. Vail (“Vinson”), which was marked as Exhibit “H.”

18. Both Cress and the Department of Natural Resources (“DNR”) objected to the admission of Vinson’s Affidavit and asserted that the Affidavit contained hearsay and legal opinions and conclusions of law. The Court took the objection under advisement and never specifically cited in its Non-Final Order whether it sustained or overruled the objection.

19. However, based on the Court’s Findings that “...the Byrers and their predecessors in interest”, it appears that the Exhibit “H” was admitted into evidence over objection.

20. It should be noted that no additional evidence given by any party to corroborate the contentions and assertions made in Exhibit “H.”

21. Nonetheless, the Vinson’s Affidavit is unclear as to whether she used more than six feet of lake water outside of the easement into the Cress riparian zone.

22. Cress contends that the objection to Vinson’s Affidavit should be sustained and the Affidavit struck and any reference in the Nonfinal Order stricken.

23. Without waiving the aforementioned objection, even if the Vinson’s Affidavit was admitted into evidence over objection, the Affidavit does little more than assert that Vinson used more than six feet of lake water by encroaching on the Shultzs’ riparian zone.

24. In addition, Paragraph 32 of the Non Final Order provides, in part, that even in the 1940s when testimony supported a finding that two-foot wide piers were not uncommon, the modest “double boat” was more than four feet wide.

25. That this finding is directly contrary to the only evidence given about the size of a common pier and width of an average boat in the 1940s.

26. As stated above, Bender acquired ownership of Lot 23 and Lot 38 in 1929; however, both lots had been in the family since the early 1900s.

27. Bender was the grandmother of Constance Carroll ("Carroll"). Carroll testified on behalf of Cress at the hearing. Carroll's testimony was particularly persuasive because her grandmother granted the original easement and docking privileges in question and was familiar with the Cress Property and Byrer Property from her early childhood.

28. Carroll was able to testify with clarity and specificity as to the historical development of Lot 23 and Lot 38, the use of the easement and placement of pier from its inception. Carroll testified that she had vacationed to Lake George every summer since 1940 until 1982, at which time she purchased a property on Lake George and became a full time resident.

29. Carroll further testified in the 1940s, the average boat on Lake George was *less than 4 feet in width* (and non-motorized) and the average pier width was between 2 and 3 feet. Carroll also testified that the most common boat on Lake George in the 1940s was called a double boat, which was less than 4 feet in width. *See* Photograph of double boats on Lake George marked as Byrers' Exhibit "S."

30. Therefore, in the 1940s, the average size pier and boat fit inside a 6 feet riparian zone. It was even more important that the average boats on Lake George were non-motorized small fishing boats.

31. Each summer Carroll routinely visited the Cress Property and she testified that no pier was ever placed on the northwest part of Lot 23 until Vinson placed a pier in or around 1985, when she purchased Lot 38.

32. The findings should have indicated that the parole evidence is that the Byers and their *immediate* predecessor in interest have exceeded six feet in width, for periods of time, due to the encroachment into the Schultz riparian zone.

33. Moreover, a finding by the Court should have been made that for a period of 40 years after the easement was created no property owners of the East Lot 23 or Lot 38 placed a pier or moored a boat off the northwest part of Lot 23.

**C. Cress objects to the findings of fact and conclusion of law contained in paragraph 33 of the Non-Final Order.**

34. The Court's findings in Paragraph 33 of the Non Final Order is contrary to the evidence, the terms of the easement agreement and Indiana law, as set forth more fully below.

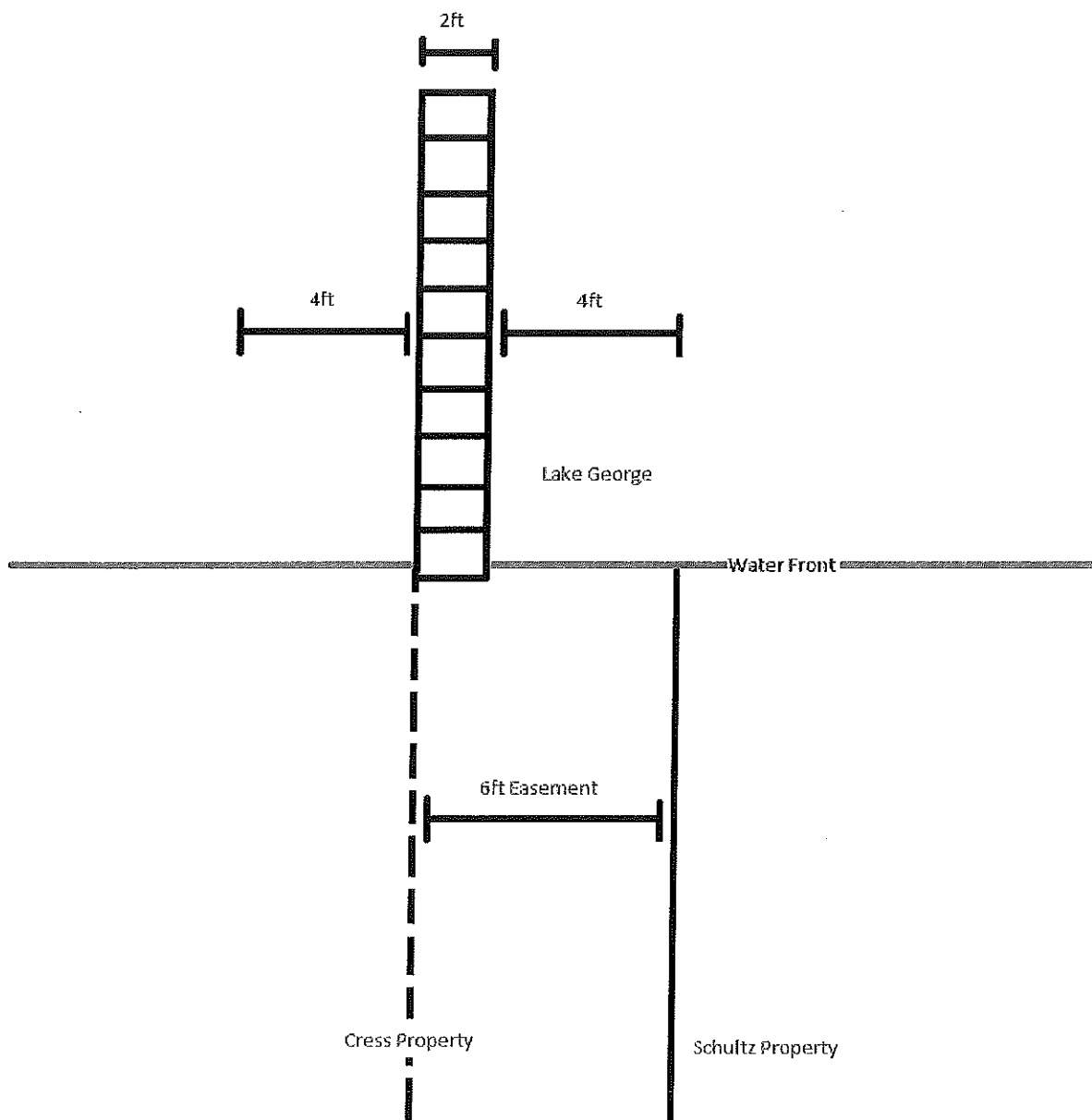
35. Paragraph 33 of the Non Final Order provides, in part, that if the grantor had intended the lake space for docking to be the same as the easement, the grantor could have specified a width or six feet or at least written nothing more that docking was available. The use of additional language indicates the grantor had something more in mind....The grantor intent in using the phrase off the northwest part of Lot 23 is ambiguous, but parol evidence supports a finding that the use of a space wider than six feet was anticipated.

36. Again, this Finding does not consider that the original easement language created docking privileges for more than Lot 38. The original easement created docking privileges for both East Lot 23 and Lot 38. The easement language granted a passway of 6 feet in width off the north side of Lot 23 and docking privilege for both the Byer Property and the East Lot 23.

37. Carroll testified that it was possible to maintain 4 average size boats on the same side of an average size pier within a 6 ft easement in the 1940's.

38. Nonetheless, if it was the grantor's intent that each dominant estate dock two boats on opposite sides of the pier, then the riparian zone for each dominant estate still must be 6 feet, in which to do so.

39. Take the following illustration:



40. There can be no question that the 6 feet passway was to give the dominant estates access to their docking privileges (and pier).

41. For the dominant estates to access their docking privileges the pier must be placed within the 6 foot easement.

42. To maximize equal riparian zones for each dominant estate, the pier would be placed on the southwest edge of the easement. This would allow both lot owners to access the pier from the easement and allow a 6 feet wide riparian zone for each dominant estate, which would include a shared pier.

43. The easement grants both East Lot 23 and the Lot 38 identical rights as to the 6 feet passway and docking privileges for two boats. Assuming the shared pier was approximately 2 feet in width, then the riparian zone for each side of the pier would be approximately 4 feet. As stated above, Carroll testified that the most common boat on Lake George in the 1940s was called a double boat, which was less than 4 feet in width and could be moored within this riparian zone.

44. Therefore, it is unequivocally clear that it was the grantor's intent that each dominant estate would have a 6 foot riparian zone in which to place a shared pier and moor two boats. The total riparian zone would total 10 feet, but encompass two separate dominant estates.

45. The East Lot 23 and West Lot 23 were recombined in 1972 extinguishing easement and docking rights, as it relates to Lot 23 East. Nonetheless, Lot 38 is still only entitled to the 6 ft riparian zone and should be limited within the 6 feet easement, which was originally contemplated by the grantor.

**D. Cress objects to the findings of fact and conclusion of law contained in paragraph 34 of the Non-Final Order.**

46. That the Court's findings in Paragraph 34 of the Non Final Order is contrary to the evidence, the terms of the easement agreement and Indiana law, as set forth more fully below.



47. John Byer testified at hearing that he could exercise his boating rights derived from the dominant estate for Lot 23 with a shoreline width of 13 or 14 feet; however, this was the extent of his testimony. John Byer did not testify with any particularity as to why 13 or 14 feet was needed to exercise his boating rights nor any additional evidence presented to support his testimony of needing 13 or 14 feet.

48. The Court found that “[a] maximum width of Fourteen feet is consistent with the terms of the easement granting the ability to dock boats off the northwest part of Lot 23. Cress respectfully disagrees and objects to this finding, as it again does not contemplate that the docking privileges were granted to two separate properties.

49. Jim Hebenstreit (“Hebenstreit”), Assistant Director of the Division of Water for the Department of Natural Resources (“DNR”), testified at the hearing. Hebenstreit is the premiere authority within the DNR for pier placement and permits and testified at these proceedings.

50. Hebenstreit reviewed the applicable deeds and easements in this matter and concluded that the Byrers’ should have a 6 foot riparian zone in which they could moor 2 boats due to the easement not providing any express language that owners of Lot 38 could maintain boat(s) outside the width of the easement.

51. Hebenstreit reasoned that the easement simply does not expressly provide that Lot 38 may exercise their docking privileges outside the width of the easement.

52. Furthermore, a reading of all three easements (East Lot 23, West Lot 23 and Lot 38) created in 1942 by Bender can give clarity as to what the grantor’s intent.

53. The easement language contained within the Warranty Deed from Bender to H. Poast, which created the East Part of Lot 23, provided, in part, that:

Also conveying an easement or passway 6 feet in width off the north side of the west part of said Lot #23 extending from the land above described to the water front of Lake George; *also docking privileges for two boats at the northwest part of said Lot #23. (emphasis added.)*

54. The creation of the 6 foot passway and the docking privileges off the northwest part of said Lot #23 were contained in the same sentence. This parol evidence establishes the grantor's intent that the dominant estate was to maintain their docking privileges within a 6 foot riparian zone.

55. The language "at the northwest part of said Lot #23" simply identifies shoreline of Lake George within the easement. The easement was located on the northeast to northwest part of the Lot 23. The Court's findings place too much emphasis on the term "northwest part." A plain reading would only encompass the 6 foot easement.

56. Again, the finding does not take into account that the original easement created docking privileges for two boats for East Lot 23 and two boats for Lot 38.

57. Therefore, if the East Lot 23 was never recombined with the West Lot 23, then the Court's finding would have given the dominant estates nearly thirty feet shoreline to exercise the property owner's boating rights. Surely, taking up approximately 50% of the shoreline was never the grantor's intent, especially considering the easement was created in 1942 and the average pier and boat sizes during this time.

58. This reasoning would have clearly exceeded the northwest part of Lot #23. The Court's finding cannot be read in harmony with the original terms of the easement.

59. A maximum width of six feet is consistent with the terms of the easement granting the ability to dock two boats off the northwest part of Lot 23.

**E. Cress objects to the findings of fact and conclusion of law contained in paragraph 36 of the Non-Final Order.**

60. That the Court's findings in Paragraph 36 of the Non Final Order is contrary to the evidence, the terms of the easement agreement and Indiana law, as set forth more fully below.

61. The Court found that the Byrers should not place or authorize a pier or another structure and should not moor or authorize the mooring of a boat more than 15 feet south of the common riparian line between Lot 23 and Lot 24. This is consistent with the Court's findings in paragraph 34.

62. Again, Cress objects to the Court extending the riparian zone from 6 feet to 15 feet, as stated above. Cress restates and incorporates all her reasons, contentions and objections as stated above, including in her objections to Paragraph 34 of the Non Final Order.

**F. Cress objects to the findings of fact and conclusion of law contained in paragraph 37 of the Non-Final Order.**

63. That the Court's findings in Paragraph 37 of the Non Final Order is contrary to the evidence, the terms of the easement agreement and Indiana law, as set forth more fully below.

64. The Court found that Cress should not place or authorize a pier or another structure or moor or authorize the mooring of a boat within 25 feet south of the common riparian line between Lot 23 and Lot 24. The limitation is an appropriate consequence of the phrase "at the north west part of Lot #23."

65. Again, the finding does not take into consideration that the original easement and docking privileges were created for more than Lot 38. This finding prohibits and limits Cress' use of approximately 40% of her riparian zone places a substantial burden on the servient estate.

66. Gunderson v. Rondinelli stands for the proposition that an easement should be construed to limit its uses to those which are reasonably necessary to carry out the original intent while putting the least burden on the servient estate. Havel & Stickelmeyer v. Fisher, et al., 11 CADDNAR 110 (2007) citing Gunderson v. Rondinelli, 677 N.E.2d 601, 603 (Ind. Ct. App. 1997).

67. The Court's findings are contrary to law by placing a significant burden on the servient estate without justification. Again, John Byer testified at the hearing that he could exercise his boating rights derived from the dominant estate for Lot 23 with a shoreline width of 13 or 14 feet. He did not specifically request a "buffer zone" or otherwise present other evidence to warrant a "buffer zone" as the Court has ordered.

68. Furthermore, Hebenstreit also testified that the facts and circumstances presented in this case would not warrant the implementation of any buffer zone in the Cress or Byers riparian zones, including consideration of the distance involved between the Schultzs' pier from the shared property line and opportunity of safe navigation.

69. A 10 foot buffer zone is not reasonable or necessary to carry out the original intent of the grantor and puts a substantial burden on the servient estate. A 5 foot or less buffer zone is sufficient to carry out the original intent of the grantor and would place a less burden on the servient estate.

**G. Cress objects to the findings of fact and conclusion of law contained in paragraph 39 and 40 of the Non-Final Order.**

70. That the Court's findings in Paragraph 39 and 40 of the Non Final Order is contrary to the evidence, the terms of the easement agreement and Indiana law, as set forth more fully below.

71. The Court found that the evidence does not support a disposition upon the affirmative defenses raised by either Byrers or Cress. The Court further found that no relief is granted to either Cress or to the Byrers on claims made which are particular to their affirmative defenses.

72. The Court throughout its findings indicates that the Byrers and their predecessor commonly used more than the six feet of lake waters that are immediately adjacent to the six-foot wide easement. It then uses this finding to justify granting the Byrers 15 feet in which to maintain a pier and moor two boats. The Court fails to consider that Byrers and their predecessor commonly used more than the six feet of lake water in the Schultz riparian zone even though they were not legally entitled to.

73. The Court uses this finding to the determinant of Cress, when finding that Byrers are entitled to a 15 feet riparian zone.

74. The Byrers come to this action with unclean hands. It is a well established maxim that one who comes into equity must come with clean hands. Edwards v. Acad. Pub. Corp., 562 N.E.2d 60, 61-62 (Ind. Ct. App. 1990).

75. Had the Byrers or Vinson attempted to moor a boat on either side of the pier within the Cress riparian zone prior to this date, the action would have been brought much sooner.

76. The fact that the Byrers commonly used more than the six feet of lake waters that are immediately adjacent to the six-foot wide easement cannot be used against Cress later because their actions amount to unclean hands.

**F. Cress objects to the paragraph (A) and (C) of the Non-final Order.**

77. That the paragraph (A) and (C) of the Non-final Order is contrary to the evidence, the terms of the easement agreement and Indiana law, as set forth above fully below. Cress reasserts and incorporates each and every objection, contention and rule of law above.

**PRELIMINARY MOTION FOR MORE DEFINITE STATEMENT**

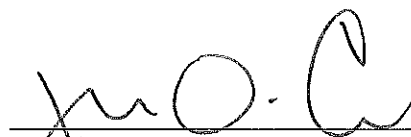
Cress has filed simultaneously herewith a Preliminary Motion for More Definite State, which is incorporated herein and made a part hereof.

**REQUEST FOR ORAL ARGUMENT**

Cress respectfully requests the opportunity to give oral argument regarding the aforementioned objections before the Commission's AOPA Committee.

Respectfully submitted:

CRESS LAW GROUP PC



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Attorney for Claimant, Lucy Cress

**CERTIFICATE OF SERVICE**

The undersigned certifies that on the 21 day of July, 2014, a true and correct copy of the foregoing pleading was served upon the following via first class mail, postage prepaid.

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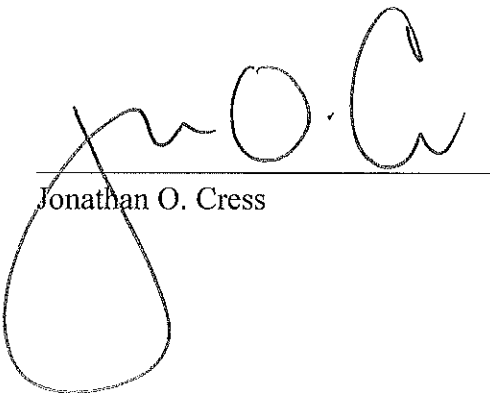
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AOPA Committee  
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Jonathan O. Cress

FILED

JUL 24 2014

NATURAL RESOURCES COMMISSION  
DIVISION OF HEARINGS

BEFORE THE  
NATURAL RESOURCES COMMISSION  
OF THE  
STATE OF INDIANA

IN THE MATTER OF:	)	
	)	
LUCY V. CRESS, ROBERT A.	)	Administrative Cause
SCHULTZ, and BARBARA J.	)	
SCHULTZ	)	
Claimants,	)	Number: 12-192W
	)	
vs.	)	(Riparian Right Dispute)
	)	
JOHN BYRER and SHERI BYRER,	)	
Respondents.	)	
	)	

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**JOHN AND SHERI BYRER'S RESPONSE TO MOTION FOR MORE  
DEFINITE STATEMENT**

---

John Byrer and Sheri Byrer, by counsel, for their Response to Motion for More Definite Statement, state as follows:

1. On or about July 21, 2014, Lucy V. Cress ("Cress") filed a Motion for More Definite Statement seeking confirmation that the Byrers' docking privileges do not include the right to place a boat lift or other structure in the water, even if it is located entirely within the Byrers' allocated portion of the riparian zone at issue.
2. In support, Cress argues that her Complaint places the matter at issue.
3. First, the Complaint did not place the matter at issue. Second, a more definite statement is not necessary. The Commission's Non-Final Order clearly provides where the Byrers can place structures. Finally, even if the Non-Final Order does not address the issue, Cress is not entitled to the relief sought.



4. The Complaint did not place the matter at issue.

a. The Complaint filed by Cress stated:

That Mr. and Mrs. Byrer have abused their easement and riparian rights by installing a pier and docking two (2) boats in excess of the six (6) foot easement. That between Mr. and Mrs. Byrer's dock, two (2) boats and boat lift, they take up approximately twenty-five (25) feet of shoreline.

b. The plain language of the Complaint confirms that Cress was not objecting to the manner in which the boats were moored (i.e., use of a boat lift), but rather, she was complaining that more than six (6) feet was being utilized. That is consistent with the arguments at trial and that is what Cress placed into issue.

5. The Non-Final Order does not require clarification. The issue raised in the Motion for More Definite Statement is within the scope of the present ruling.

a. The Byrers have 15 feet to the south of the common riparian line between Lot 23 and Lot 24 within which to exercise their rights.

b. The use of a boat lift by the Byrers will stay entirely within that 15 feet as required.

c. In fact, contemplating the possible use of such a structure, the Non-Final Order provides that the Byrers can place a straight pier in the water but *cannot* place a structure on the north side of the pier. To the contrary, the Non-Final Order continues and allows the placement of structures on the south side of the pier *but not* beyond the 15 feet. A boat lift is such a structure.

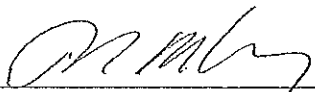
6. Cress is not entitled to the relief sought.

- a. While the Byrers maintain that the present Non-Final Order addressed the boat lift issue and that authorization for placement of a boat lift is within the scope of the order, even if it was not, Cress is not entitled to the relief sought.
- b. There is no question the Byrers having docking privileges for two boats.
- c. Cress's entire argument is premised on the contention that there is no specific reference to boat lifts in the language of the easement, and that John Byrer testified the easement does not specifically state that lot owners can place a boat lift in the water.
- d. John Byrer's acknowledgement of the precise language of the easement is not a concession that the rights flowing from the actual language used, and the parties' own historical use, is limited.
- e. Use of a boat lift is merely a means of exercise the docking privileges and is within the scope of what is authorized under the easement. In fact, any doubt or uncertainty as to the construction of the easement language is ordinarily construed in favor of the grantees (i.e., the Byrers). *See Rehl v. Billetz*, 963 N.E.2d 1, 7 (Ind. Ct. App. 2012).
- f. That the Byrers choose to moor the boat to their pier by way of a boat lift, as opposed to another means, is irrelevant. The Byrers are entitled to exercise their rights in such a manner as to protect the watercraft and pier from a boat that may otherwise knock around if not on a lift.
- g. So long as the Byrers stay within their 15 feet, Cress should not be heard to complain.
- h. To the extent clarification is needed, the Byrers request that the Commission clarify that the Byrers may, in fact, use a boat lift so long as they stay within their 15 feet.

WHEREFORE, the Byrers, by counsel, respectfully request that the Commission enter an Order denying the Motion for More Definite statement or, in the alternative, enter an Order confirming that the Byrers have the express right to use a boat lift in connection with their pier and docking privileges so long as they stay within their 15 feet.

Respectfully submitted,

CARSON BOXBERGER LLP

By:   
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**CERTIFICATE OF SERVICE**

The undersigned certifies that on the 24<sup>th</sup> day of July, 2014, a true and correct copy of the foregoing pleading was served upon the following via first class mail, postage prepaid.

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\_\_\_\_\_  
Jason M. Kuchmay

**BEFORE THE  
NATURAL RESOURCES COMMISSION  
OF THE  
STATE OF INDIANA**

**IN THE MATTER OF:**

<b>LUCY V. CRESS, ROBERT A.</b>	)	
<b>SCHULTZ and BARBARA J. SCHULTZ,</b>	)	
<b>Claimants,</b>	)	<b>Administrative Cause</b>
	)	<b>Number: 12-192W</b>
<b>vs.</b>	)	
	)	
<b>JOHN BYRER and SHERI BYRER,</b>	)	
<b>Respondents.</b>	)	
	)	<b>(Riparian Rights Dispute)</b>
<b>DEPARTMENT OF NATURAL RESOURCES,</b>	)	
<b>Agency Respondent.</b>	)	

**ENTRY WITH RESPECT TO CRESS MOTION FOR MORE DEFINITE STATEMENT**

On July 21, 2014, Cress filed a Motion for More Definite Statement directed to the Findings of Fact and Conclusions of Law with Nonfinal Order of the administrative law judge. John and Sheri Byrer's Response to Motion for More Definite Statement was filed on July 24. After reviewing the motion and response, the administrative law judge denies the motion and adopts in principle the Byrers' request for authorization to maintain a boat lift as long as they stay within the space allocated to them. To this effect, the administrative law judge would tender the following amendments to the Findings of Fact and Conclusions of Law with Nonfinal Order:

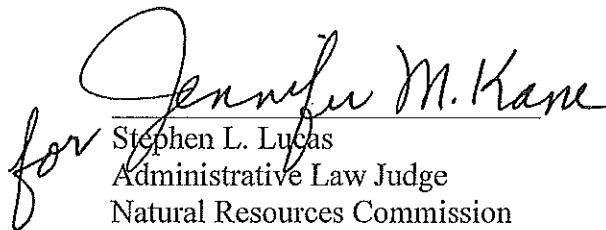
A new Finding 36 would provide with subsequent Findings renumbered consistently:

36. Subsequent to entry by the administrative law judge of the Findings of Fact and Conclusions of Law with Nonfinal Order, Cress moved for a more definite statement regarding the ability of the Byers to maintain a boatlift, and the Byrers responded to the motion. For consideration is an easement conferring docking privileges. As applicable to this proceeding, a "drydock...is a...vessel that can be floated to allow a load to be floated in, then drained to allow that load to come to rest on a dry platform." A "boat lift" is a form of floating drydock that is commonly used in private marinas to keep boats out of the water while not in use. Wikipedia, Drydock, <http://en.wikipedia.org/wiki/Drydock> (describing the history and utility of drydocks) (last modified July 22, 2014 at 21:10 GMT). Piers and boatlifts are structures used to exercise docking privileges. See, generally, *Scharlach v. Doswell*, 11 Caddnar 420 (2008). The use of a boatlift is as much the exercise of a docking privilege as is the use of a pier.

In addition, Part (A) of the Final Order should be modified as follows:

(A) John Byrer and Sheri Byrer must not place a structure or moor a boat in Lake George adjacent to Lot 23 or Lot 24 except as follows: The Byers shall not encroach on the riparian zone of the Schultzes as identified in Finding 13. The Byers may place a pier, boat lift, or similar structure used in the exercise of dock privileges a reasonable distance into Lake George that is no less than one foot south of the common riparian line between Lot 23 and Lot 24. The Byers must not place a structure north of the pier this structure. The Byers may moor two boats on the south side (or one on the south side and one on the lakeward side) of a single straight pier that is not more than three feet wide. The Byers must not place or authorize a pier or another structure and must not moor or authorize the mooring of a boat more than 15 feet south of the common riparian line between Lot 23 and Lot 23.

Dated: July 28, 2014

for Jennifer M. Kane

Stephen L. Lucas  
Administrative Law Judge  
Natural Resources Commission  
Indiana Government Center North  
100 North Senate Avenue, Room N501  
Indianapolis, IN 46204-2200

(317) 233-3322

A copy of the foregoing was sent to the following persons. A person that files a pleading or document with the Commission must also serve a copy on these persons or their attorneys:

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Indianapolis, IN 46204

cc: Lori Schnaith, DNR Division of Water

BEFORE THE  
NATURAL RESOURCES COMMISSION  
OF THE  
STATE OF INDIANA

FILED

AUG 07 2014

NATURAL RESOURCES COMMISSION  
DIVISION OF HEARINGS

IN THE MATTER OF:	)	
	)	
LUCY V. CRESS, ROBERT A.	)	Administrative Cause
SCHULTZ, and BARBARA J.	)	
SCHULTZ	)	
Claimants,	)	Number: 12-192W
	)	
vs.	)	(Riparian Right Dispute)
	)	
JOHN BYRER and SHERI BYRER,	)	
Respondents.	)	
_____	)	

---

**JOHN AND SHERI BYRER'S RESPONSE TO OBJECTIONS**

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John Byrer and Sheri Byrer, by counsel, for their Response to Objections, state as follows:

**I. INTRODUCTION**

Lucy Cress ("Cress") initiated her action against John and Sheri Byrer (the "Byrers") in an effort to deny them their docking privilege acquired when they purchased their back-lot property at Lake George. The docking privilege arises pursuant to an easement created more than 70 years ago. There are actually two separate and distinct easements created in the original 1942 deed (the "Prior Deed"). One easement creates a passageway of 6 feet (the "Passageway"). The Passageway was created because the Byrer Property and the Cress Property were once under common ownership and were then split causing one parcel to be landlocked, and the other to no longer touch the water's edge. The Passageway benefitted both properties and allowed the backlot owner to cross the property to access the water, and provided the waterfront lot access to



the road. *Separate from the Passageway*, and in a separate conveyance within the same deed, the Byrer Property was deeded a dock privilege for two boats (the “Docking Privilege”) off the northwest part of Lot Number 23 (the Cress Property). The dimensions of the Docking Privilege are not specified in the deed creating the right and are the subject of the ruling by Judge Lucas in this action.

In her Objections, Cress ignores the context within which the Docking Privilege was created, the manner in which the right was exercised, focuses on testimony supporting her claim only while ignoring the balance of the testimony and evidence, and she continues to urge a strained reading of the deeds at issue to deny the Byrers their rights. In fact, after Judge Lucas issued his ruling declaring the dimensions of the Docking Privilege, Cress filed a Motion for More Definite Statement urging Judge Lucas to hold that the Byrers cannot use a boatlift, even if they are entirely within their portion of the riparian zone. That request was denied. The Byrers’ response and a copy of the ruling is attached as, Exhibit “A”. The Byrers’ specific response to the Objections follows.

## **II. RESPONSE TO OBJECTIONS**

### **A. Paragraph 19 of the Non-Final Order is Proper**

1. Cress argues that Paragraph 19 of the Non-Final Order is contrary to the evidence and the terms of the easement agreement.

2. Paragraph 19 is nothing more than a quotation of a portion of the Prior Deed, a copy of which is attached as, Exhibit “B”.

3. The first two paragraphs recited in the Non-Final Order accurately reflect the language of the deed.

4. The last paragraph accurately reflects the deed's language as to the Byrer Property which is the portion relevant to this proceeding. To be accurate, Paragraph 19 should include ellipses as follows to reflect the omitted portion relating to unrelated property.

Also reserving the docking privileges for two boats at the northwest part of said Lot #23 for the owners or tenants of...Lot #38 of said plat.

5. The omitted language was a separate docking privilege for two boats afforded to the East Parcel that was originally split off from the Cress Property, *in addition* to the Docking Privilege for two boats afforded to the Byrer Property. The omission is inconsequential as the easement for the East Parcel no longer exists. The East Parcel later came under common ownership again with the balance of Lot 23 (i.e., the Cress Property), and one cannot have an easement over their own property. Cress acknowledges this in paragraph 45 of her Objections. A memorandum submitted into evidence at trial, and which details the parties' property history, is attached as, Exhibit "C".

6. The fact that there are two separate docking privileges, each separately for two boats, is only relevant as further evidence that the Docking Privilege was not intended to be restricted to six feet as Cress continues to argue.

**B. Paragraph 32 of the Non-Final Order is Proper**

7. Judge Lucas correctly observed that, "[a] factual constant is difficulty to identify in this proceeding." Cress objects to this sentence arguing the evidence was largely contradicted. That is not the case and the evidence speaks for itself in that regard. Regardless, the sentence is dicta and immaterial to the decision itself. The balance of Cress's objection to this paragraph then, oddly, essentially attacks the evidence.

8. The second sentence of Paragraph 32 that is the subject of Cress's attack held:

But the Byrers and their predecessors in interest have commonly used more than the six feet of lake waters that are immediately adjacent to the six-foot wide easement.”

9. The above sentence is supported by significant evidence and is accurate.

- The Byrers’ predecessor Nancy Vinson (“Vinson”) testified by Affidavit that she maintained a straight pier *in front of the Cress Property* and she had one boat on each side of the pier – with a row boat on the Cress-side of the pier.
- Cress acknowledged during her trial testimony that the row boat was 4-feet wide and the pier was 3-feet wide. There is no question Vinson used more than 6 feet of the Cress zone, and *not* due to encroachment on the Schultz side<sup>1</sup>.
- Testimony also confirmed that every time the Byrers moored a boat to the Byrer Pier, they utilized more than 6 feet.
- Initially, the Byers placed a 1977 Ski Nautique on the Schultz-side of the Byrer Pier. The boat was 188 inches wide, which is almost 10 feet. Moored to a 3-foot wide pier, the use far exceeded 6 feet.
- The Byrers next moored a boat referred to as “Little Lucy” *on the Cress side* of the Byrer Pier. Little Lucy was about 5 feet wide and was moored to the double-wide section of the Byrer Pier which, by itself, was 6 feet and 6 inches wide. Thus, there was more than 9 feet of use, all on the Cress side. A photograph depicting the double-wide section of the pier is attached as, Exhibit “D”.
- In 2007, the Byrers got rid of Little Lucy and placed an 8 foot pontoon *on the Cress side* of the Byrer Pier.

10. The suggestion that the Byrers only exceeded 6 feet by encroaching on the Schultz side is a distortion of the evidence and irrelevant (if true). Any alleged encroachment does nothing to change the nature of the deeded property right.

11. Vinson acquired the Byrer Property in 1985. Thus, the uses described above spanned the last 29 years of use.

---

<sup>1</sup> Not that any alleged encroachment would change the nature of the deeded property right.

12. Cress argues that the Vinson affidavit was improperly considered by Judge Lucas but provides no authority to support that position. As the Committee is aware, Ind. Code §4-21.5-3-26 provides that an administrative law judge *may admit hearsay evidence*. Moreover, if there is an objection, and the hearsay evidence does not fit within an exception, the hearsay evidence may still be admitted, but the “resulting order may not be based solely upon the hearsay evidence.” Cress does not argue that the Non-Final Order is based solely upon the Vinson Affidavit and, obviously, it is not. Moreover, John Byrer testified he placed his pier in the same location as Vinson which provides all of the necessary context for her remaining testimony regarding use.

13. Cress next hand picks select evidence in support of her contention that historically boats on Lake George were less than 4 feet wide. That is not the case, and there was ample evidence to the contrary for Judge Lucas to rely upon, which he did.

14. First, there was testimony that 8 foot wide pontoon boats and speed boats are very common and customary on Lake George today.

15. Second, testimony did indicate that in the 1940’s, a double boat was commonplace, which is essentially two canoes put together. A picture of a double boat is attached as, Exhibit “E”. The testimony of Connie Carroll (“Carroll”) does not support Cress’s argument. Carroll was a child when she observed the double boats and her present perspective from what she observed more than 60 years ago was likely skewed. Nonetheless, Carroll testified that two grown adults could sit side by side in the double boat with a center between them of about 8 inches. Moreover, Carroll testified that the double boat was wider than a standard row boat, which Cress acknowledged during trial was 4 feet. Thus, a double boat exceeds 4 feet and, even with a 2-foot pier, would exceed 6 feet.

16. Byrer also testified about his research into boats from that era which included canoes with a 54-inch beam and outboards with a 5-foot beam. None of those boats could be moored to a pier and be within a 6-foot riparian zone.

17. While the historical use favors the Byrers, case law confirms that the width of an unspecified easement is that which is reasonably convenient and necessary for the purposes for which the way was created. *Helmick v. Lambright*, 2012 WL 7037591 (Ill.App. 4 Dist). Moreover, judges are not to limit the right of way to the means of transportation in common use at the time the easement was created. *Cater v. Bednarek*, 969 N.E.2d 705 (Mass. 2012).

18. Finding 32 was proper and the Cress objection should be overruled.

**C. Paragraph 33 of the Non-Final Order is Proper**

19. Paragraph 33 accurately recites Indiana law regarding rules of construction and Cress does not argue to the contrary.

20. Instead, Cress argues that the original easement language created docking privileges for more than just the Byrer Property and that it is unequivocally clear that the grantor's intent was that each would have a 6 foot riparian zone which would include a shared pier – and curiously using a 10 feet riparian zone. *That construction is not supported by the deed language or the parties' historical use.* Moreover, *that construction defeats Cress's own argument that the size of the riparian zone is limited to the width of the Passageway.*

21. The fact is, the grantor could have specified the dimensions of the Docking Privilege and did not.

22. The Docking Privilege is most certainly not limited to the width of the 6-foot Passageway. Again, the Docking Privilege and the Passageway were created in entirely different parts of the deed, for separate purposes. Recall, the creation of the East Parcel caused the

balance of Lot 23 to be landlocked. The Passageway was necessary for that property owner to access the road, among other things. That has nothing to do with riparian rights.

23. Reading the Docking Privilege and Passageway to be the same ignores the context in which they were created and violates the rule of construction requiring one to presume all parts of the deed are intended to have meaning and are to be harmonized. *Keene v. Elkhart County Park and Recreation Bd.*, 740 N.E.2d 893, 897 (Ind. Ct. App. 2000).

24. Moreover, nothing in the Prior Deed suggests that both property owners that have docking privileges are to have a shared pier. That is an incredible assumption by Cress and certainly is not “unequivocally clear” as she suggests.

25. If anything, that there are two property owners with separate docking privileges, each for two boats, suggests an intention that the resulting riparian zone is greater than 6 feet and not equivalent to the width of the Passageway. This is confirmed by looking at the balance of the Prior Deed. The first paragraph of the Prior Deed creates the Passageway and, in the very next sentence, conveys a parking space for two vehicles. Testimony at trial confirmed that 2 vehicles could not park in a space that was 6 feet wide and Cress acknowledged during trial that the parking and the Passageway were two separate things. She cannot take a contrary position with respect to the Docking Privilege for 2 boats.

**D. Paragraph 34 of the Non-Final Order is Proper**

26. Cress objects to Finding 34 by contending that limiting the maximum width of the Byrers’ portion of the riparian zone to 14 feet does not contemplate that the docking privileges were granted to 2 separate properties.

27. First, there is no indication that Cress’s contention is true. The Commission was presented with the entire chains of title for the Cress Property and the Byrer Property. Both

Cress and the Byrers argued there were originally 2 separate privileges. Of course, there is now only one and the Commission's charge was to determine the dimensions of that one privilege, which it did.

28. The testimony of Jim Hebenstreit does not aid Cress's cause. Hebenstreit is knowledgeable and respected on issues of pier placement. Hebenstreit, however, testified he has no legal training. He is not in a position to testify about the property rights created by deeds recorded 72 years ago.

29. Examination of the deed creating the East Parcel does nothing to aid Cress's cause. The deed discusses a passageway to access the water since the access was cut off when Lot 23 was split. The deed then references docking privileges for 2 boats at the northwest part of said Lot 23. This deed did not create the docking privilege. That occurred in the Prior Deed. This deed merely conveyed the right already reserved.

30. Finding 34 is proper and the objection should be overruled.

**E. Paragraph 36 of the Non-Final Order is Proper**

31. Paragraph 36 does not extend the riparian zone from 6 to 15 feet. Paragraph 36 defines the amount of the zone that the Byrers can use pursuant to their easement for the Docking Privilege. This Response has already discussed the reasons that is proper.

32. Moreover, Paragraph 36 is consistent with Paragraph 34 which acknowledged John Byrer's testimony that he could exercise his boating rights in 14 feet. Recall, the Non-Final Order requires the Byrer pier to be located 1 foot south of the Cress/Schultz riparian line. Limiting the mooring of boats to 15 feet is simply recognizing that.

**F. Paragraph 37 of the Non-Final Order is Proper**

33. Cress next objects to the Commission's decision prohibiting her from placing a structure or mooring a boat within 25 feet of the common riparian line for Cress/Schultz. This is a recognition of the 15 feet for the Byrers, and allowing for a 10-foot buffer zone.

34. Nothing in that finding places a substantial burden on the Cress Property without justification.

35. First, Cress acquired her property subject to the Docking Privilege. That is nothing new.

36. Second, Information Bulletin #56 was a stipulated document in evidence and was before Judge Lucas for consideration. That Judge Lucas considered Information Bulletin #56 and the testimony from the parties regarding navigation issues, and decided to impose a buffer zone, is a decision entirely within his right.

37. In fact, John Byrer testified about navigational difficulties mooring a boat on the Cress-side of the Byrer Pier due to the wind and other factors. Since Judge Lucas ordered the Byrers to moor any boats on the Cress-side of the Byrer Pier there is nothing improper about providing a buffer zone.

**G. Paragraphs 39 and 40 of the Non-Final Order Are Proper**

38. Cress objects to Paragraphs 39 and 40 and argues that the Byrers' encroachment on the Schultz side over the years amounts to unclean hands and those action cannot be used against Cress.

39. Cress also argues that the Commission relied on the Byrers' and their predecessor's use of more than 6 feet in rendering its decision, but that the Commission failed to consider that the use was an encroachment. That is incorrect, this Response has already



established that more than 6 feet was historically used on the Cress side, regardless of any use of the Schultz riparian zone.

40. Further, the Byrers maintained the Byrer Pier where it always was and placed boats on either side without objection, as did their predecessor. The Byers and Vinson all believed that was a proper exercise of their rights and there is nothing inequitable about their conduct.

41. Moreover, this action is merely one to determine the dimensions of a property right. Cress offers no authority to suggest that an equitable defense somehow precludes the Commission from making that determination. The Commission merely looked at the language of the operative deed and interpreted that against the backdrop of how the parties exercise the right over the years.

42. There was no unclean hands, the defense is not available to Cress, and Findings 39 and 40 are proper.

#### **H. Paragraphs (A) and (C) of the Non-Final Order Are Proper**

43. As discussed above, the Findings rendered by Judge Lucas are proper, are supported by the evidence, and are consistent with the facts presented during trial.

44. Those Findings support Paragraphs (A) and (C) of the Non-Final Order.

#### **PRELIMINARY MOTION FOR MORE DEFINITE STATEMENT**

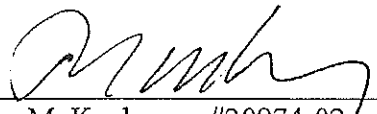
Cress incorporates by reference her Preliminary Motion for More Definite Statement into her Objections. The Byrers incorporate by referenced their response and Judge Lucas's decision on the Preliminary Motion, both of which are attached as Exhibit A.

### **III. CONCLUSION**

For the above and foregoing reasons, for the reasons stated in the Byrers' Post-Trial Brief, to be argued during oral argument, and based on the evidence presented to the Commission at trial, the Byrers request that the Committee overrule the Objections in their entirety, with the possible exception of adding ellipses to Finding 19.

Respectfully submitted,

CARSON BOXBERGER LLP

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*Attorney for the Respondents*

**CERTIFICATE OF SERVICE**

The undersigned certifies that on the 7<sup>th</sup> day of August, 2014, a true and correct copy of the foregoing pleading was served upon the following via first class mail, postage prepaid.

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Lori Schnaith  
Department of Natural Resources  
Division of Water  
Indiana Government Center South  
402 W. Washington Street, Rm W264  
Indianapolis, IN 46204

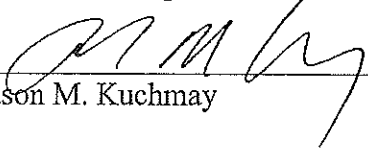
Robert A. and Barbara J. Schultz  
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Eric L. Wyndham, Esq.  
Office of Legal Counsel  
Department of Natural Resources  
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403 W. Washington Street, Room W295  
Indianapolis, IN 46204

The undersigned also certifies that on the 7<sup>th</sup> day of August, 2014, a true and correct copy of the foregoing pleading was served upon the following via Federal Express, overnight delivery, delivery fee prepaid:

AOPA Committee  
Natural Resources Commission  
Indiana Government Center North  
100 North Senate Avenue, Room N501  
Indianapolis, IN 46204

Stephen L. Lucas  
Administrative Law Judge  
Natural Resources Commission  
Indiana Government Center North  
100 North Senate Avenue, Room N501  
Indianapolis, IN 46204

  
\_\_\_\_\_  
Jason M. Kuchmay



BEFORE THE  
NATURAL RESOURCES COMMISSION  
OF THE  
STATE OF INDIANA

IN THE MATTER OF:	)	
	)	
LUCY V. CRESS, ROBERT A.	)	Administrative Cause
SCHULTZ, and BARBARA J.	)	
SCHULTZ	)	
Claimants,	)	Number: 12-192W
	)	
vs.	)	(Riparian Right Dispute)
	)	
JOHN BYRER and SHERI BYRER,	)	
Respondents.	)	
	)	

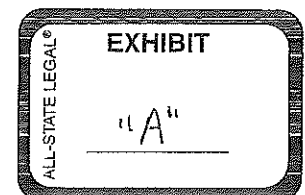
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**JOHN AND SHERI BYRER'S RESPONSE TO MOTION FOR MORE  
DEFINITE STATEMENT**

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John Byrer and Sheri Byrer, by counsel, for their Response to Motion for More Definite Statement, state as follows:

1. On or about July 21, 2014, Lucy V. Cress ("Cress") filed a Motion for More Definite Statement seeking confirmation that the Byrers' docking privileges do not include the right to place a boat lift or other structure in the water, even if it is located entirely within the Byrers' allocated portion of the riparian zone at issue.
2. In support, Cress argues that her Complaint places the matter at issue.
3. First, the Complaint did not place the matter at issue. Second, a more definite statement is not necessary. The Commission's Non-Final Order clearly provides where the Byrers can place structures. Finally, even if the Non-Final Order does not address the issue, Cress is not entitled to the relief sought.



4. The Complaint did not place the matter at issue.

a. The Complaint filed by Cress stated:

That Mr. and Mrs. Byrer have abused their easement and riparian rights by installing a pier and docking two (2) boats in excess of the six (6) foot easement. That between Mr. and Mrs. Byrer's dock, two (2) boats and boat lift, they take up approximately twenty-five (25) feet of shoreline.

b. The plain language of the Complaint confirms that Cress was not objecting to the manner in which the boats were moored (i.e., use of a boat lift), but rather, she was complaining that more than six (6) feet was being utilized. That is consistent with the arguments at trial and that is what Cress placed into issue.

5. The Non-Final Order does not require clarification. The issue raised in the Motion for More Definite Statement is within the scope of the present ruling.

a. The Byrers have 15 feet to the south of the common riparian line between Lot 23 and Lot 24 within which to exercise their rights.

b. The use of a boat lift by the Byrers will stay entirely within that 15 feet as required.

~~c. In fact, contemplating the possible use of such a structure, the Non-Final~~  
Order provides that the Byrers can place a straight pier in the water but *cannot* place a structure on the north side of the pier. To the contrary, the Non-Final Order continues and allows the placement of structures on the south side of the pier *but not* beyond the 15 feet. A boat lift is such a structure.

6. Cress is not entitled to the relief sought.

a. While the Byrers maintain that the present Non-Final Order addressed the boat lift issue and that authorization for placement of a boat lift is within the scope of the order, even if it was not, Cress is not entitled to the relief sought.

b. There is no question the Byrers having docking privileges for two boats.

c. Cress's entire argument is premised on the contention that there is no specific reference to boat lifts in the language of the easement, and that John Byrer testified the easement does not specifically state that lot owners can place a boat lift in the water.

d. John Byrer's acknowledgement of the precise language of the easement is not a concession that the rights flowing from the actual language used, and the parties' own historical use, is limited.

e. Use of a boat lift is merely a means of exercise the docking privileges and is within the scope of what is authorized under the easement. In fact, any doubt or uncertainty as to the construction of the easement language is ordinarily construed in favor of the grantees (i.e., the Byrers). *See Rehl v. Billetz*, 963 N.E.2d 1, 7 (Ind. Ct. App. 2012).

f. That the Byrers choose to moor the boat to their pier by way of a boat lift, as opposed to another means, is irrelevant. The Byrers are entitled to exercise their rights in such a manner as to protect the watercraft and pier from a boat that may otherwise knock around if not on a lift.

g. So long as the Byrers stay within their 15 feet, Cress should not be heard to complain.

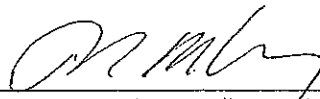
h. To the extent clarification is needed, the Byrers request that the Commission clarify that the Byrers may, in fact, use a boat lift so long as they stay within their 15 feet.

WHEREFORE, the Byrers, by counsel, respectfully request that the Commission enter an Order denying the Motion for More Definite statement or, in the alternative, enter an Order confirming that the Byrers have the express right to use a boat lift in connection with their pier and docking privileges so long as they stay within their 15 feet.

Respectfully submitted,

CARSON BOXBERGER LLP

By:



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Telephone: (260) 423-9411

*Attorney for the Respondents*



**CERTIFICATE OF SERVICE**

The undersigned certifies that on the 24<sup>th</sup> day of July, 2014, a true and correct copy of the foregoing pleading was served upon the following via first class mail, postage prepaid.

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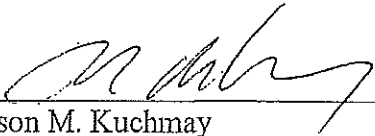
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\_\_\_\_\_  
Jason M. Kuchmay

BEFORE THE  
NATURAL RESOURCES COMMISSION  
OF THE  
STATE OF INDIANA

IN THE MATTER OF:

LUCY V. CRESS, ROBERT A.	)	
SCHULTZ and BARBARA J. SCHULTZ,	)	
Claimants,	)	Administrative Cause
	)	Number: 12-192W
vs.	)	
	)	
JOHN BYRER and SHERI BYRER,	)	
Respondents.	)	
	)	(Riparian Rights Dispute)
DEPARTMENT OF NATURAL RESOURCES,	)	
Agency Respondent.	)	

ENTRY WITH RESPECT TO CRESS MOTION FOR MORE DEFINITE STATEMENT

On July 21, 2014, Cress filed a Motion for More Definite Statement directed to the Findings of Fact and Conclusions of Law with Nonfinal Order of the administrative law judge. John and Sheri Byrer's Response to Motion for More Definite Statement was filed on July 24. After reviewing the motion and response, the administrative law judge denies the motion and adopts in principle the Byrers' request for authorization to maintain a boat lift as long as they stay within the space allocated to them. To this effect, the administrative law judge would tender the following amendments to the Findings of Fact and Conclusions of Law with Nonfinal Order:

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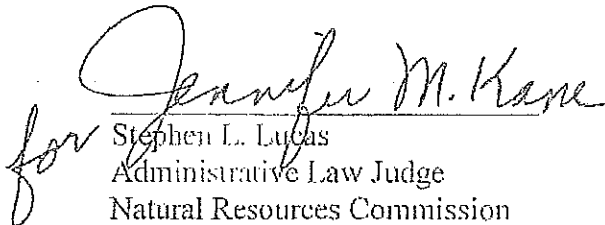
A new Finding 36 would provide with subsequent Findings renumbered consistently:

36. Subsequent to entry by the administrative law judge of the Findings of Fact and Conclusions of Law with Nonfinal Order, Cress moved for a more definite statement regarding the ability of the Byers to maintain a boatlift, and the Byrers responded to the motion. For consideration is an easement conferring docking privileges. As applicable to this proceeding, a "drydock...is a...vessel that can be floated to allow a load to be floated in, then drained to allow that load to come to rest on a dry platform." A "boat lift" is a form of floating drydock that is commonly used in private marinas to keep boats out of the water while not in use. Wikipedia, Drydock, <http://en.wikipedia.org/wiki/Drydock> (describing the history and utility of drydocks) (last modified July 22, 2014 at 21:10 GMT). Piers and boatlifts are structures used to exercise docking privileges. See, generally, *Scharlach v. Daswell*, 11 Caddnar 420 (2008). The use of a boatlift is as much the exercise of a docking privilege as is the use of a pier.

In addition, Part (A) of the Final Order should be modified as follows:

- (A) John Byrer and Sheri Byrer must not place a structure or moor a boat in Lake George adjacent to Lot 23 or Lot 24 except as follows: The Byers shall not encroach on the riparian zone of the Schultzes as identified in Finding 13. The Byers may place a pier, boat lift, or similar structure used in the exercise of dock privileges a reasonable distance into Lake George that is no less than one foot south of the common riparian line between Lot 23 and Lot 24. The Byers must not place a structure north of the pier this structure. The Byers may moor two boats on the south side (or one on the south side and one on the lakeward side) of a single straight pier that is not more than three feet wide. The Byers must not place or authorize a pier or another structure and must not moor or authorize the mooring of a boat more than 15 feet south of the common riparian line between Lot 23 and Lot 23.

Dated: July 28, 2014

  
for Stephen L. Lucas  
Administrative Law Judge  
Natural Resources Commission  
Indiana Government Center North  
100 North Senate Avenue, Room N501  
Indianapolis, IN 46204-2200

(317) 233-3322

A copy of the foregoing was sent to the following persons. A person that files a pleading or document with the Commission must also serve a copy on these persons or their attorneys:

---

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Eric L. Wyndham  
Office of Legal Counsel  
Department of Natural Resources  
Indiana Government Center South  
403 West Washington Street, Room W295  
Indianapolis, IN 46204

cc: Lori Schnaith, DNR Division of Water



in said certificate, situate in the County of Steuben and State of Indiana, and described as follows, namely:

Lots Number thirty-seven (37) and thirty-eight (38) in Noyes Addition, to the town of Fremont, Indiana, according to the recorded plat thereof.

TO HAVE AND TO HOLD the said last mentioned tract or parcel of land, with the appurtenances thereto belonging, to the said party of the second part, his heirs and assigns forever, in as full and ample a manner as the said Auditor of said County is empowered by law to sell the same.

In testimony Whereof, the said Jesse O. Covell Auditor of the said County of Steuben has hereunto set his hand and affixed the seal of the Board of County Commissioners, the day and year last above written.

(Comm: SEAL)

Jesse O. Covell  
Auditor Steuben County.

Attest: Lester Porter  
Treasurer Steuben County

STATE OF INDIANA, Steuben COUNTY, SS:

Before me, the undersigned Mary E. Duckwall, Recorder in and for said County, this day personally came the above named Jesse O. Covell Auditor of said County, and acknowledged that he signed and sealed the foregoing Deed for the uses and purposes therein mentioned.

In Witness Whereof, I have hereunto set my hand and seal, this 22nd day of May 1942

(Recorder's SEAL)

Mary E. Duckwall

(Seal.)

No revenue

Transferred May 22, 1942 Fee 20¢

Recorded May 23, 1942 at 3:00 P.M.

*Mary E. Duckwall*  
Mary E. Duckwall, Recorder

93-565

#3877 WARRANTY DEED Alline Buck Bender -to- Phil S. Morse, et ux.

This Indenture Witnesseth: That Alline Buck Bender, an unmarried woman, over the age of 21 years, of Steuben County in the State of Indiana Convey and Warrant to Phil S. Morse and Mildred Morse, husband and wife, as tenants by entireties, of Steuben County in the State of Indiana for the sum of ---Eighteen hundred and thirty-five and no/100---Dollars, the following Real Estate, in Steuben County, in the State of Indiana, to-wit:

Lot numbered 23 in the recorded plat of Wilder's Addition to Spring Bar, a resort in Jamestown, Township, said county and state, excepting 65 feet east and west off the entire east end of said Lot. Also conveying an easement or passway 6 feet in width off the north side of the east part of said Lot #23 extending from the land above described to the street or road way along the east side of said Lot #23. Also conveying an auto parking space for two automobiles or vehicles in the northeast corner of said Lot #23 for the use of owners or tenants of the cottage located on the west portion of said Lot #23.

Excepting an easement or passway 6 feet in width off the north side of the above described premises extending from the east 65 feet of said lot to the water front of Lake George for the use of the owners or tenants of the cottages located on the east part of said Lot #23 and on Lot #38 of said Plat.

Also reserving the docking privileges for two boats at the northwest part of said lot #23 for the owners or tenants of the east part of said Lot #23 and for two boats for the owners or tenants of Lot #38 of said Plat.

The grantor agrees to pay the spring installment of the taxes against said premises due and payable in the year 1942.

This conveyance is made subject to the fall installment of the taxes against said premises due and payable in the year 1943 and thereafter.

Also conveying the contents of the cottage located on said premises.

Possession to be given upon the delivery of this deed.

ALL-STATE LEGAL

EXHIBIT

"B"

93-566

In Witness Whereof, The said Alline Buck Bender, an unmarried woman, over the age of 21 years, has hereunto set her hand and seal this 19th day of May A. D., 1942.

Alline Buck Bender (L.S.)

STATE OF INDIANA, Steuben County, ss:

Before me, Orville Stevens, notary public in and for said county, this 19th day of May A. D., 1942, personally appeared Alline Buck Bender, an unmarried woman, over the age of 21 years, and acknowledged the execution of the annexed deed.

Witness my hand and official seal, this 19th day of May 1942.

Orville Stevens (L.S.)  
Notary Public. (Notary Seal)

My Commission Expires December 12, 1945.

Revenue Stamps \$2.20

Transferred May 23, 1942 fee \$10.00

Recorded May 23, 1942 at 3:45 P.M.

*Mary E. Duckwall*  
Mary E. Duckwall, Recorder

.....#####  
#3886/ EXECUTOR'S DEED Charles B. Dougherty, Executors et al. -to- John B. Strebig, et al.

Charles B. Dougherty and Harris W. Hubbard, Executors of the last will of Doak R. Best, Deceased, as such executors, with the power conferred upon them by will to convey without order of court therefore, hereby convey to John B. Strebig and Cleora F. Strebig, husband and wife, as tenants by the entireties of Allen County, in the State of Indiana, for the sum of \$950, which is the full appraised value thereof, the following described real estate in Steuben County, in the State of Indiana, to-wit:

Commencing at a point 30 rods and 6 feet north of the southeast corner of the northwest quarter of section 17, township 37 north, range 15 east, and running thence south 30 rods and 6 feet to the center post of said section; thence west on the quarter line to the center of the highway about 43 1/2 rods; thence northerly 40 rods and 6 feet along the center of the highway; thence easterly 23 rods to the place of beginning, containing 8 acres of land, more or less. Also a strip of land 34 rods wide off the south end of the west half of the northeast quarter of section 17, township 37 north, range 15 east.

This conveyance is made subject to the taxes for the year of 1942 payable in the year of 1943 and all taxes thereafter.

In Witness Whereof the said Charles B. Dougherty and Harris W. Hubbard, executors as aforesaid, have hereunto set their hands and seals this the 14 day of April, 1942.

Charles B. Dougherty (Seal)  
Harris W. Hubbard (Seal)  
Executors of the Estate of Doak R. Best,  
Deceased

State of Indiana, Steuben County, ss:

Before me, Virgil Metz, a Notary Public in and for said County, this 14th day of April, 1942, came Charles B. Dougherty and Harris W. Hubbard, Executors of the estate of Doak R. Best, Deceased, as such executors acknowledged the execution of the annexed deed.

Witness, my hand and official seal.

Virgil Metz (Seal)  
Notary Public (Notary Seal)  
My Commission expires April 5, 1945.

Examined and approved by me this 16 day of April, 1942.

Clyde C. Carlin  
Judge of the Steuben Circuit Court

Revenue Stamps \$1.10

Transferred May 25, 1942 fee 20¢

Recorded May 26, 1942 at 9:00 A. M.

*Mary E. Duckwall*





BEFORE THE  
NATURAL RESOURCES COMMISSION  
OF THE  
STATE OF INDIANA

IN THE MATTER OF:

LUCY V. CRESS, ROBERT A.	)	Administrative Cause
SCHULTZ, and BARBARA J.	)	
SCHULTZ	)	
Claimants,	)	Number: 12-192W
	)	
vs.	)	(Riparian Rights Dispute)
	)	
JOHN BYRER and SHERI BYRER,	)	
Respondents.	)	
	)	

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JOHN & SHERI BYRER'S TRIAL MEMORANDUM REGARDING  
PROPERTY RIGHTS

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Respondents, John Byrer and Sheri Byrer (collectively, the "Byrers"), by counsel, for their Trial Memorandum Regarding Property Rights, state as follows:

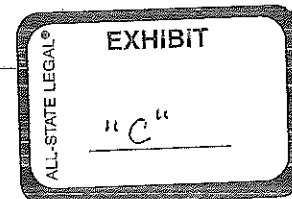
**I. INTRODUCTION**

This matter involves a dispute over pier placement and the scope of certain easement rights possessed by the Byrers. The parties have stipulated to the admissibility of the underlying deeds creating and defining the Byrers' pier rights. This Memorandum provides a summary of the applicable deeds and details the rights at issue.

**II. ISSUES**

Distilled to its most basic level, the issues before the Commission are as follows:

- Byrer contends that, in addition to conveying Lot No. 38 in the Plan of Wilder's Addition to Spring Bank (the "Byrer Property"), the deed to their property (the "Byrer Deed") conveys two distinct and important rights:



- First right – a six (6) foot passageway (the “Passageway”) across Lot No. 23 (the “Cress Property”), which Passageway extends from the road on the west side of the lot to the water front; and
- Second right – a dock privilege for two boats off the northwest part of Lot No. 23 (the “Docking Privilege”).

A true copy of the Byrer Deed is located in the Exhibit Binder as Exhibit “A”.

- The evidence will show that the Byrers, and their predecessors, have consistently used the Docking Privilege to place a straight pier in the water of Lake George, with one (1) boat docked on either side of the pier.
- This was done for more than twenty (20) years without objection from Cress or Schultz.
- More recently, in an apparent effort to expand upon her usage, Cress now claims that there are not two (2) rights, but only one (1) right granted to the Byrers, and that is a six (6) foot easement, creating a six (6) foot riparian zone.
- Cress then seeks to limit the placement of any pier and watercraft in the water to six (6) feet which, as the Commission is aware, is unworkable. Further, as discussed below, that position is inconsistent with the parties’ respective property rights.
- The Schultzes maintain that the Byrer pier improperly extends into their riparian zone.

### III. PROPERTY RIGHTS

1. The Cress Property and Lot 38 (the Byrer Property) were once under common ownership. *See* Warranty Deed to Aline Bender, dated March 2, 1929, a copy of which is located in the Exhibit Book attached as Exhibit “B”.

2. By Warranty Deed dated May 19, 1942 (the “Prior Deed”), Aline Bender divided up Lot 23 (separating the east sixty five (65) feet of Lot 23 (the “East Parcel”) from the balance of Lot 23). A true copy of the Prior Deed is located in the Exhibit Book as Exhibit “C”. The Prior Deed did several important things:

a. First, it conveyed Lot 23 to Phil and Mildred Morse excepting the East Parcel (see pink highlight on the color-coded plat located in the Exhibit Book as Exhibit "D"; *see also* Exhibit C).

b. Second, since the new East Parcel landlocked the remaining portion of Lot 23 and prohibited access to the road, and since the new East Parcel blocked lake access for Lot 38 across the street (i.e., the Byrer Property), an easement conveying a 6 (six) foot passway was created. *See* Exhibit C, depicted in orange highlight on Exhibit D.

c. Third, an easement or passway six (6) feet in width was created on the north end of the remaining portion of Lot 23, for the benefit of the owners or tenants of the cottages on the newly created East Parcel, and the Byrer Property. *See* Exhibit C, depicted in green highlight on Exhibit D.

d. In all, the Passageway extends from the road to the water's edge.

e. Fourth, in an entirely separate paragraph of the Prior Deed, docking privileges were reserved at the northwest part of Lot 23 for the owners of the new East Parcel, and "for two boats for the owners or tenants of [the Byrer Property]. *See* Exhibit C.

3. On the same day as the Prior Deed, another deed (the "Other Prior Deed") was executed conveying the East Parcel to H. Poast. A true copy of the Other Prior Deed is located in the Exhibit book as Exhibit "E".

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a. The Other Prior Deed confirms the Passageway for the remaining portion of Lot 23 and for Lot 38.

b. The Other Prior Deed confirms the remainder of the Passageway over Lot 23 and also docking privileges for two (2) boats.

4. By Warranty Deed dated June 24, 1957, Phil and Mildred Morse acquired the East Parcel. A true copy of the Warranty Deed is located in the Exhibit Book as Exhibit "F". The entirety of Lot 23 was again under common ownership.

5. By Warranty Deed dated May 22, 1983, Cress acquired her interest in the Cress Property. A copy of the Warranty Deed for the Cress Property is located in the Exhibit Book as Exhibit "G". The Warranty Deed confirmed it was subject to the easements and restrictions contained in the Prior Deed (i.e., the Passageway and Docking Privileges in favor of the Byrer Property).

6. By Warranty Deed dated April 30, 1992, John Byrer first acquired his interest in the Byrer Property, together with his rights in the Passageway and the Docking Privilege. *See* Exhibit A.

7. The Byrers secured an Affidavit from their predecessor in title, Nancy Vinson ("Vinson")(formerly Nancy Vail), a copy of which is located in the Exhibit Book as Exhibit "H". Vinson owned the Byrer Property for seven (7) years, from 1985 until she sold the property to the Byrers in 1992. Cress maintained an ownership interest in the Cress Property during the entirety of Vinson's ownership of the Byrer Property and, during that time, Vinson believed that the Passageway and the Docking Privilege were two separate rights. *See* Exhibit I, ¶7. Consistent with the Byrers' beliefs and usage, Vinson maintained a straight pier in front of the Cress Property and she had one (1) boat on each side of the pier. *Id.* at ¶8. The pier and boats exceeded six (6) feet and Cress never once objected to having a boat on either side of the straight pier. *Id.* at ¶¶9 and 11. Finally, Vinson confirmed she never believed she was limited to six (6) feet of shoreline for a pier and boats and she consistently used more than six (6) feet during her period of ownership. *Id.* at ¶10.

Respectfully submitted,

CARSON BOXBERGER LLP

By: 

Jason M. Kuchmay, #20974-02

[kuchmay@carsonboxberger.com](mailto:kuchmay@carsonboxberger.com)

301 W. Jefferson Blvd., Suite 200

Fort Wayne, IN 46802

Telephone: (260) 423-9411

*Attorney for the Byrers*

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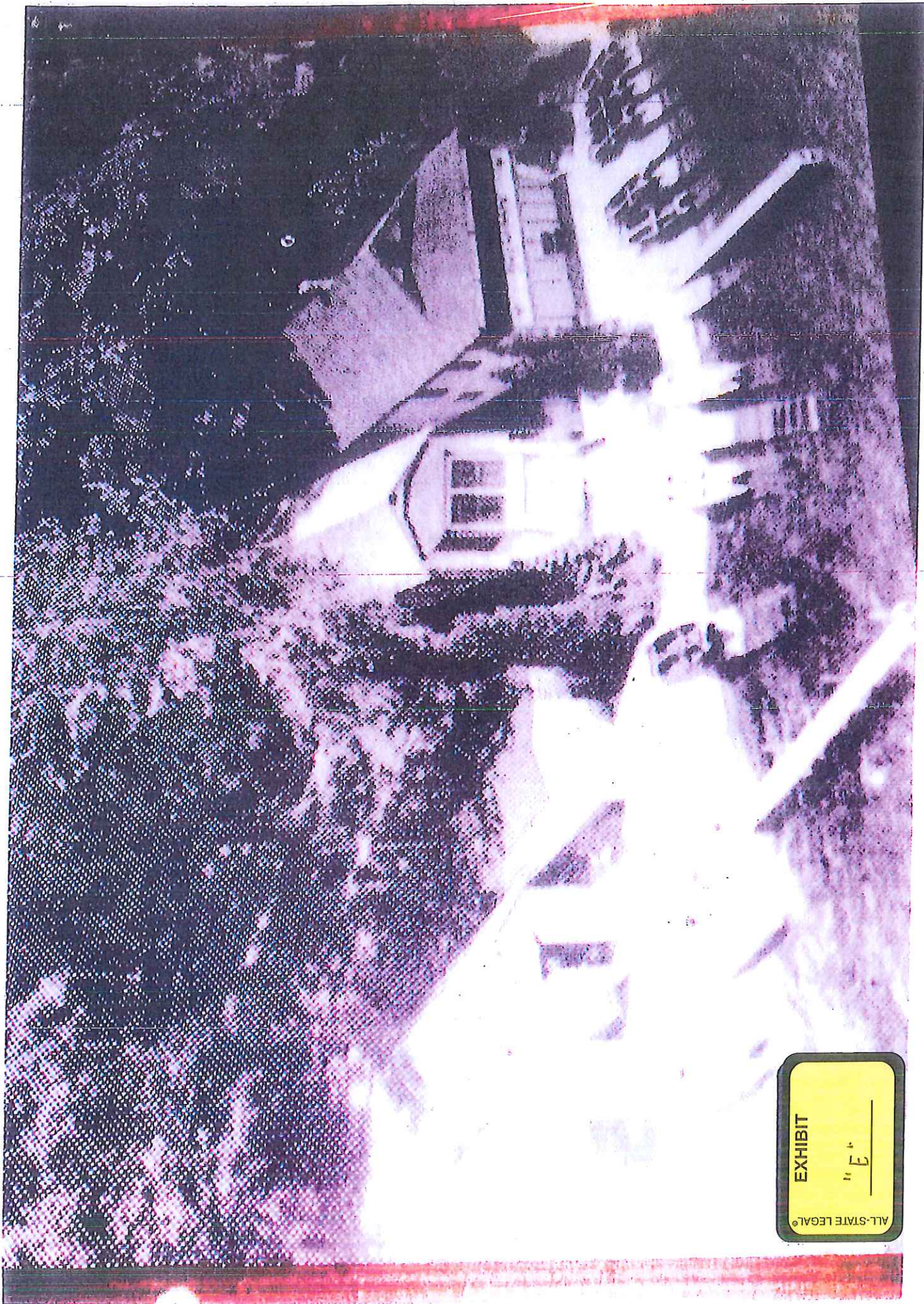
EXHIBIT

"D"









EXHIBIT

"E"

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